No. 16,137

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANK RELEFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Third Judicial Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291 and 1292 prior to the amendments appearing in Public Law No. 85-508, 72 Stat. 339.

COUNTERSTATEMENT OF THE CASE.

On October 9, 1957, Beverly June Tullo, alias Linda Bishop, accompanied Harry Robbins and his wife, Pat Robbins, to meet Frank Releford at Steilacoom, Washington, and then the four of them went to Seattle. After stopping for a few drinks they went to Beverly Tullo's residence where she picked up a few more clothes and then they proceeded on to Yakima, then to Mattawa, Washington, arriving there about 10:30 in the evening. Frank Releford and Beverly Tullo stayed with the Robbins at their trailer for three days. During this time she and Frank Releford discussed her coming to Anchorage, Alaska, and working in the Eldorado, a restaurant owned by him, as a waitress and a prostitute and about using the upstairs bedrooms in the club (TR 72, 73). Releford told her she could make more money in Alaska than she could in Washington (TR 73). The first night Tullo and Releford were in Mattawa she engaged in prostitution.

After Releford's three day visit they took him to Yakima to catch a bus so he could go to Seattle and take a plane to Anchorage, Alaska. About three weeks later Harry Robbins was visited by Frank Releford who stayed only for a short period of time. On October 20, or 21, Beverly Tullo received in the mail a Pacific Northern Airlines ticket from Releford for transportation from Seattle to Anchorage. On November 25 at Portland she called Releford in Anchorage and asked him to send her some money. On November 26 he sent her a telegraphic money order in the amount of thirty dollars (TR 127).

Beverly June Tullo left Seattle on November 27 for Anchorage, Alaska, via Pacific Northern Airlines. Frank Releford and Wade Gibson met her at the Anchorage Airport and they went directly to the Eldorado. That evening Tullo worked as a waitress and a prostitute and she gave the earnings to Releford (TR 75). She continued to work in Anchorage as a prostitute until December 6th. On December 11th she was arrested and charged with soliciting for the purpose of prostitution.

Frank Releford was indicted by a Grand Jury in Anchorage for a violation of 18 U.S.C.A. 2421 (White Slave Traffic Act). On April 28, 1958, the case was set for trial, but a continuance was granted. On May 19, 1958, a jury trial was held in the District Court for the District of Alaska. The appellant was convicted and received a sentence of thirty months. An appeal was taken to this Court.

QUESTIONS PRESENTED.

Whether the evidence was sufficient to sustain the conviction.

Whether the District Court committed error by denying the defendant's Motion for Judgment of Acquittal.

Whether the District Court committed plain error in regard to the impeachment by the government of its witness Tullo.

Whether the Court erred in its instructions on credibility.

Whether the Court committed prejudicial error by asking a question the answer to which disclosed that the appellant had been in prison.

Whether the appellant was deprived of his constitutional right to counsel.

ARGUMENT.

I.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

The Robbins testified that they took Beverly Tullo, alias Linda Bishop, with them to meet the appellant at McNeil Island. Then, the four of them travelled by automobile to Seattle where Tullo obtained some clothes from her residence. After they arrived in Mattawa, Washington, the appellant and Tullo stayed with the Robbins in their trailer for three days, after which Releford went to Anchorage, Alaska. The appellant returned three weeks later, but stayed only for a short time.

During the three day period, the appellant and Tullo discussed her coming to Anchorage and working as a waitress and prostitute (TR 72). She was to work at a restaurant called the Eldorado, which had bedrooms upstairs (TR 73). Releford told her that she could make more in Alaska than she could in Washington. She worked at her profession the first night

they were in Mattawa. Around October 20, 1958, Tullo got a Pacific Northern Airlines ticket in the mail from the appellant for transportation from Seattle to Anchorage.

A few days later she went to Portland and on November 25, 1957, she phoned Releford and asked him for some money. He sent her thirty dollars by telegraphic money order. On November 27, 1957, Tullo flew from Seattle to Anchorage, where she was met by the appellant and Wade Gibson (TR 75). That night she worked in the Eldorado as a prostitute and gave her earnings to the appellant. She continued her activities until December 6th or 7th, and on the 11th she was arrested on the charge of soliciting for the purpose of prostitution, to which she entered a guilty plea and received a suspended sentence.

Beverly Tullo, the government's witness, was corroborated by the testimony of the Robbins; government's Exhibit No. 1 which was the used ticket in the possession of the witness; Exhibit No. 4 which was the manifest; Exhibit No. 5 which was the passenger ticket and baggage check; Exhibit No. 6 which was the application for the money order in the sum of thirty dollars; and Exhibit No. 7 which was the toll ticket for the call from Tullo to the appellant. Wade Gibson testified that he and the appellant met Tullo and took her to the Eldorado (TR 124). Tullo testified that the appellant knew she was a prostitute before she came to Alaska (TR 115).

Considering this evidence, the jury could conclude that the transportation was effected by the appellant

with the intent and purpose of placing Beverly June Tullo in prostitution in Anchorage. The jury could also draw an inference as to intent from the fact that the ticket which the appellant sent to Tullo reflected refundable only to Bert McFadden, East Fireweed Lane. Bert McFadden testified that he did not purchase the ticket and did not know Beverly Tullo until November (TR 119).

In *Woodward Laboratories v. United States,* 198 F. 2d 995, 998 (9th Cir. 1952), this Court said:

> "The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680. See Banks v. United States, 9 Cir., 1945, 147 F.2d 628."

The evidence was more than a mere scintilla. It was substantial evidence, which means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Edison Co. v. Labor Board,* 305 U.S. 197, 229 (1938).

When the witness Beverly Tullo first took the stand she became a hostile witness and denied the conversation in Mattawa between herself and the appellant about her working for him as a prostitute and stated that she didn't give the appellant any money from her activities in Anchorage (TR 44). After Tullo had

been impeached by the government she again took the stand and admitted that she had lied in her previous testimony (TR 71). When the case was submitted to the jury, the Assistant United States Attorney requested the Court to cite Beverly Tullo for contempt for her admitted violation of her oath. The District Judge later cited her for contempt.

Although it may appear from some of her answers to questions after she agreed to tell the truth that they are inconsistent, a careful analysis discloses that her testimony was not conflicting on the material facts. Furthermore, the record does not reflect that she was threatened with a prejury prosecution by the Assistant United States Attorney.

The case of *Hinton v. United States,* 196 F. 2d 605 (D.C. Cir. 1952) cited by the appellant is not in point with our present case. In *Hinton* there were two children—one six years old and the other eight, and in each case the testimony of the child concerned was practically the only evidence having any tendency to prove a crime. One child had previously told two different stories, each entirely inconsistent with the other, and with her testimony at the trial. In our case Mrs. Tullo didn't tell the truth in court at first, but later testified to the facts she gave in her statement to the F.B.I. However, the facts in the present case do apply to this statement in the *Hinton* opinion, "It is of course true that self-contradiction by the government's sole eye witness is not always fatal to the government's case, for circumstances may prove a defendant's guilt beyond reasonable doubt."

The acts of the appellant before and after the transportation were competent as bearing on the element of intent.

This Court in *Frank Rios, Jr. v. United States,* ..... F. 2d ....., October 7, 1960, No. 16,925, stated in its opinion:

> "We are required to regard the evidence and all inferences that may be drawn therefrom most favorably in support of the judgment of the trial court. Sandez v. United States, 9 Cir., 1956, 239 F. 2d 239. We cannot substitute our judgment for that of the trier of facts below where there is a conflict in the evidence. Glasser v. United States, 1941, 315 U.S. 68, 80."

Though the testimony of Mrs. Tullo may have been conflicting in part, there is substantial evidence in the record to support the verdict and the judgment.

II.

THE DISTRICT COURT DID NOT COMMIT ERROR BY DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE CASE.

The appellant states in his second specification of error that the Court erred in allowing a conviction based on a perjurious government impeached witness. Evidently he urges upon this Court that the motion for judgment of acquittal should have been granted by the District Court at the close of the case and since it was not granted the denial constituted reversible error (TR 139, 140).

The appellee has in its previous argument pointed out to the Court where the evidence supports the verdict.

The government agrees with the statement in *Mesarosh v. United States,* 352 U. S. 1, 9 that "the dignity of the United States Government will not permit the conviction of any person on tainted testimony", however, such a fact stiuation is not present in the instant case.

Mrs. Tullo testified before the jury that she lied when she first took the stand, but she was now going to tell the truth, and then proceeded to do so. All her testimony was before the jury which was the proper body to determine her credibility and weigh the evidence under the Court's Instructions Nos. 11, 12, 12a, 13 and 17 given by the Court. *Louis P. Hattem v. United States,* ..... F.2d ..... (9th Cir. 1960), No. 16,467.

Trial counsel made substantially the same arguments to the jury that appellant is now making to this Court (TR 144-155). Even a convicted perjurer may testify competently. *Schoppell v. U. S.,* 270 F. 2d 413, 416 (4th Cir. 1959). The witness, Beverly Tullo is not and was not a convicted perjurer. This Court in *Schino v. U. S.,* 209 F. 2d 67, 72 (9th Cir. 1954) stated,

> "Appellants each assert that, as to himself, the evidence is insufficient to support the verdict. In determining this question, we must consider the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 68, 62 S. Ct. 457, 86 L. Ed. 680; Woodward Labora-

tories v. United States, 9 Cir., 198 F. 2d 995. Viewed in this light, the state of the evidence is such that a juror's reasonable mind *'could* find that the evidence excludes every reasonable hypothesis but that of guilt'. In such a situation, the case must be submitted to the jury, and their decision is final. Remmer v. United States, 9 Cir., 205 F.2d 277, 287-288, and cases cited. The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the question arises on a motion for a judgment of acquittal.''

III.

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN REGARD TO THE IMPEACHMENT BY THE GOVERNMENT OF ITS WITNESS TULLO.

The Assistant United States Attorney did not bring out everything contained in the F.B.I. statement and it seemed better practice not to claim surprise and ask permission of the Court to impeach the witness in front of the jury.

Able trial counsel did not object to the impeachment of the witness, which is proper in federal courts and is expressly permitted by statute in Alaska. ACLA 1949 §58-4-59; §58-4-62.

No request was made by the appellant to limit the evidence to impeachment, either when it was received or at the conclusion of the trial. No objection was

made to the Court's instructions on impeachment (TR 159). No request for additional instructions was made. This Court has decided in a similar fact situation that no plain error was committed by the trial Court. *Stevens v. U. S.*, 256 F. 2d 619, 623 (9th Cir. 1958).

IV.

THE COURT DID NOT ERR IN ITS INSTRUCTIONS ON CREDIBILITY.

Appellant urges that the trial Court erred in failing to instruct that Mrs. Tullo's testimony should be viewed with care. Trial counsel made no objection to the instructions, therefore, unless there is plain error pursuant to Rule 52 F.R.Cv. Proc., the question should not be considered on appeal. The trial Court did give Instruction No. 17, which reads in part as follows:

> "A witness wilfully false in one part of his testimony may be distrusted in others."

It is difficult to see how the trial Court committed plain error under these circumstances.

V.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR BY ASKING A QUESTION THE ANSWER TO WHICH DISCLOSED THAT THE APPELLANT HAD BEEN IN PRISON.

After both counsel had stated they had nothing further to ask the witness Tullo, the Court asked several questions (TR 116). The Court asked, "What was the occasion that brought you two together?" Mrs. Tullo answered, "Well, a friend of ours, Mr. Robbins, knew Frank Releford in McNeil Island Penitentiary and he was getting out October 9 and so they asked me if I'd like to go over and meet him." (TR 117). No objection was made nor was any request made to the Court to instruct the jury in regard to the answer.

However, earlier in the trial, counsel for appellant brought out on cross-examination the very fact which appellant now urges this Court to consider as prejudicial error (TR 96). Counsel asked Mrs. Tullo, "You figured he was pretty well established up here?" She answered, "I knew he couldn't have been too well established because he had just got out of the penitentiary."

If the trial judge had instructed the jury that the fact the defendant had been in prison could not be considered by them in determining his guilt without an objection or a request from counsel, no doubt the appellant would be claiming error because the Court emphasized the matter to the jury. In appellee's opinion, the trial attorney was wise to do nothing to impress this point on the jurors and the appellant should not now be able to allege error after the verdict went against him.

VI.

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL.

The case was originally set for trial on April 28, 1958, and was continued upon the motion of the appellant. On May 16, 1958, Mr. Buckalew was appointed counsel for the appellant. On May 19, 1958, Mr. Buckalew requested another day to prepare the defense (TR 3), and advised the Court that Mr. Releford did not wish to sign the pauper's oath. The appellant said he would prefer Mr. Kay, but he did not object to being represented by Mr. Buckalew (TR 4). The U. S. Constitution amendment VI provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the assistance of counsel for his defense."

The Constitution does not guarantee to an accused in a criminal prosecution the right to the assistance of any particular attorney. If so, indigent prisoners could delay trials by claiming the lawyer appointed was not their choice.

The Court granted Mr. Buckalew's request for a continuance until the next day (TR 5). Appellant now alleges that his attorney was forced to trial without adequate preparation. Trial counsel did not move for an additional continuance nor does the record reflect that counsel was unprepared. In fact, he had an opportunity to discuss the case with at least one government witness (TR 91).

CONCLUSION.

For the reasons and the law set forth herein, appellee requests this Court to affirm the judgment of the Court below.

Dated, Fairbanks, Alaska,
October 31, 1960.

Respectfully submitted,

GEORGE M. YEAGER,
United States Attorney,
Attorney for Appellee.

(Appendix Follows.)

Appendix.

Appendix

ALASKA COMPILED LAWS ANNOTATED, 1949

§58-4-59. *Party's right to impeach own witness.* The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 58-4-62.

§58-4-62. *Impeachment by proof of inconsistent statements: Preliminary requirements.* A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present; and he shall be asked whether he has made such statements, and, if so, allowed to explain them. If the statements be in writing they shall be shown to the witness before any question is put to him concerning them.